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LIQUOR CONTROL — MANUFACTURER OF ALCOHOLIC BEVERAGES—NOT FORBIDDEN TO LIST IN ADVERTISING OF MANUFACTURER NAMES AND ADDRESSES OF WHOLESALE DISTRIBUTORS WHERE MANUFACTURER'S PRODUCTS MAY BE PURCHASED—ANNOUNCEMENT MAY BE MADE IN ADVERTISING OF APPOINTMENT OF NEW WHOLESALE DISTRIBUTOR—REGULATION 44, SECTION F, BOARD OF LIQUOR CONTROL—SECTION 4301.24 RC.

SYLLABUS:

Neither Section (F) of Regulation No. 44 of the Regulations of the Board of Liquor Control nor Section 4301.24, Revised Code, forbids a manufacturer of alcoholic beverages from listing in the advertising of such manufacturer the names and addresses of the wholesale distributors where the manufacturer's products may be purchased, nor from making an announcement in such advertising of the appointment of a new wholesale distributor.

Columbus, Ohio, July 2, 1954

Hon. Anthony J. Rutkowski, Director, Department of Liquor Control
Columbus, Ohio

Dear Sir:

It appears from your letter of May 20, 1954 that it has been the "practice for many years for members of the alcoholic beverage industry and practically all brewing companies, to include in their newspaper and bill-board advertising, a statement listing the names and addresses of wholesae distributors where the brewing companies' products could be purchased" and that "Such advertisements were entirely paid for by the brewing company."

On May 12, 1954, Mr. Joseph S. Harrell, Assistant Director, addressed a letter to all distillers, rectifiers, brewers, malt beverage distributors, wineries and wine distributors doing business in Ohio, notifying them that such practice was in contravention of Section (F) of Regulation No. 44 of the Regulations of the Board of Liquor Control.

Thereafter, protests were made that such practice was not prohibited. You thereupon requested my opinion as to whether if a manufacturer of

alcoholic beverages in its advertisements gave the name or address of any wholesale distributors where the manufacturer's products might be purchased or made an announcement of the appointment of a new wholesale distributor of such products such would be in violation of (a) Section (F) of Regulation No. 44, or (b) of the first paragraph of Section 4301.24, Revised Code.

I shall first consider the question of whether such practice violates the provisions of Section (F) of Regulation No. 44. The authority of the Board of Liquor Control to adopt regulations as to advertising is conferred by Section 4301.03, Revised Code. This statute so far as pertinent reads as follows:

> "The board of liquor control may adopt and promulgate, repeal, rescind, and amend, in the manner required by this section, rules, regulations, standards, requirements, and orders necessary to carry out Chapters 4301. and 4303. of the Revised Code, including the following:
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> "(F) Uniform rules and regulations governing all advertising with reference to the sale of beer and intoxicating liquor throughout the state and advertising upon and in the premises licensed for the sale of beer or intoxicating liquor;"

Pursuant to such statutory authorization, the Board of Liquor Control has adopted Regulation No. 44 consisting of Sections (A) through (G), each section dealing with some phase of advertising. The only language of the regulation of possible application to the question presented is that contained in the first paragraph of Section (F) which reads:

> "No manufacturer or wholesale distributor of alcoholic beverages may sponsor or participate in any advertising program for or with any retail permit holder; nor shall such manufacturer or wholesale distributor of alcoholic beverages state or give the name or address of any permit holder where the beverages handled by such manufacturer or wholesale distributor of alcoholic beverages may be obtained or purchased."

The language above quoted which precedes the semicolon is clear and unambiguous. It prohibits either a manufacturer or wholesale distributor of alcoholic beverages (1) from sponsoring an advertising program for any *retail* permit holder, or (2) from participating in any advertising program with any *retail* permit holder. The language which follows the semicolon does not appear to be a model of clarity. The letter of May 12,

1954 from Mr. Harrell laid particular stress on the language "any permit holder," and concluded that such language included "each and every class of permit holder authorized to do business under the Ohio Department of Liquor Control." After detailed consideration of the entire sentence, I cannot agree with such conclusion. The reasons for my conclusion follow:

If the words "any permit holder" are given the meaning attributed to them in the May 12 letter, one is immediately confronted with the rather anomalous situation by which the regulation would not forbid a manufacturer from sponsoring or participating in an advertising program for or with a wholesale distributor, but would forbid him "from stating or giving the name or address" of such wholesale distributor. If it be said that stating or giving the name or address of *any permit holder* would, per se, forbid sponsoring or participating in any advertising program for or with *any permit holder,* the reference to *retail* permit holder before the semicolon becomes absolutely meaningless. In the process of construing statutes or regulations, it is fundamental that a construction should be adopted which would avoid absurd or anomalous situations, unless the language actually employed is capable of no other construction. Here, I believe that the language actually employed is capable of another construction.

I believe that the language employed following the semicolon is not a completely severable and independent thought from that which precedes the semicolon. This is illustrated by the fact that a separate sentence was not employed and by the fact that the language after the semicolon nowhere refers specifically to advertising. If the language following the semicolon were a severable and independent thought, the *literal* language employed would forbid a manufacturer from even verbally telling anyone the name or address of a wholesale distributor who handled the beverage of the manufacturer. In fact, the *literal* language would even forbid a manufacturer from stating or giving his own name and address by way of advertising or otherwise, he, of course, having a manufacturer's permit and thus falling within the scope of the prohibition against giving the name or address of "any permit holder." This would forbid all advertising by manufacturers or wholesale distributors even though such is specifically authorized by Section (B) of Regulation No. 44. Obviously, therefore, we may not consider the language following the semicolon as an independent thought and, on such basis, accept the literal language employed

as correctly reflecting the intent of the Board of Liquor Control in adopting the regulation.

As heretofore noted, the language following the semicolon makes no specific reference to advertising. It does, however, make reference to "such" manufacturer or wholesale distributor. By this word of limitation which must be given some meaning, it would appear that a cross-reference is made back to the language before the semicolon. If "such" be construed as referring to *any* manufacturer or wholesale distributor who does *any* advertising, we are faced with the anomaly heretofore referred to. It must therefore be accorded some other meaning if reasonably possible. The language before the semicolon is limited to the relationship between the manufacturer or wholesale distributor on the one hand and the *retail* permit holder on the other hand. I conclude, therefore, that the word "such" has the effect of limiting the reference to manufacturers and wholesale distributors in their relationship to *retail* permit holders. Thus, the reference to "any permit holder" is limited to the special class of permit holders specifically referred to, i.e., *retail* permit holders.

In this connection, it must be remembered that the language before the semicolon prohibits the manufacturer or wholesale distributor (1) from sponsoring an advertising program for a retail permit holder, or (2) from participating in an advertising program with a retail permit holder. Apparently, there was some doubt as to whether a mere listing of the retailer where the advertisement was paid for in full by the manufacturer or wholesale distributor and where the advertisement was devoted primarily to advertising the manufacturer or wholesale distributor himself or his products, would be a violation of such prohibition, since the advertiser might contend that he was not sponsoring an advertising program for a retail permit holder but for himself and, there being no financial contribution by the retail permit holder, he was not participating in an advertising program with the retail permit holder. It would seem that to avoid possible doubt as to this, language was employed which, in effect, specifically forbade such listing. In my opinion, however, such language cannot reasonably be construed as extending the prohibitions set forth in the foregoing part of the sentence beyond the scope to which they specifically were limited by the language preceding the semicolon.

My conclusion in this respect is further fortified by the fact that it long has been the practice of the manufacturers to include in their advertising

a statement listing the names and addresses of the wholesale distributors in the area reached by such advertisement. Apparently no attempt has ever been made by the Department of Liquor Control to cite either the manufacturer or wholesaler for suspension or revocation of permits and it apparently was assumed by all persons concerned that such an advertising program was proper. A long continued administrative interpretation of Regulation No. 44 has been established which while not conclusive should not be disturbed unless the language of the regulation would make it imperative to do so. Industrial Commission v. Brown, 92 Ohio St., 309, 311.

I turn now to the question of whether such practice would violate the provisions of Section 4301.24, Revised Code. This section in pertinent part reads as follows:

> "No manufacturer shall aid or assist the holder of any permit for sale at wholesale and no manufacturer or wholesale distributor shall aid or assist the holder of any permit for sale at retail by gift or loan of any money or property of any description or other valuable thing, or by giving premiums or rebates. No holder of any such permit shall accept the same, provided that the manufacturer or wholesale distributor may furnish to a retail permittee the inside signs or advertising and the tap signs or devices authorized by divisions (F) and (G) of section 4301.22 of the Revised Code. * * *"

The key language of the statute apparently thought to be of possible application reads:

> "No manufacturer shall aid or assist the holder of a permit for sale at wholesale * * * by gift * * * of * * * (a) valuable thing."

There, of course, could be no question as to the fact that an advertisement paid for by the manufacturer advertising "X" beer and listing the names of the local wholesale distributors of "X" beer would be of benefit to the wholesale distributors. To a slightly lesser degree, the same benefit would ensue to the wholesale distributors even if the advertisement were confined to advertising "X" beer with no listing of the names of the wholesale distributors. To an extent, therefore, it could be said that either of such advertisements is of some value to the wholesale distributors. Neither, however, in my opinion constitutes, per se, a violation of Section 4301.24, Revised Code. The manufacturer has not made a gift to the wholesale distributor but instead has engaged in a business activity which he hopes

will result in increased business to himself and incidentally to the wholesaler and to the retailer as well. The statute does not by its terms forbid all activity by the manufacturer which would be of benefit or value to the wholesaler. It forbids the gift of a valuable thing. In any gift there must be a donor and a donee. The gift prohibited by the statute therefore must be a gift from the manufacturer to the wholesale distributor. It cannot be said as a matter of law that any activity which might benefit the wholesale distributor would constitute a "gift" to such wholesale distributor within the purview of the statute.

All that I have said before as to the import to be given long continued administrative practice is equally applicable to an interpretation of Section 4301.24, Revised Code.

In conclusion, it would appear that if there be evils in the system, which would forbid a manufacturer or wholesale distributor from listing in its advertisements the names of retail permit holders but would allow a manufacturer in its advertisements to list the names of its wholesale distributors, such must be corrected after consideration by the Board of Liquor Control by amendment of Section (F) of Regulation No. 44. In specific answer to your question, it is my opinion that neither Section (F) of Regulation No. 44 of the Regulations of the Board of Liquor Control nor Section 4301.24, Revised Code, forbids a manufacturer of alcoholic beverages from listing in the advertising of such manufacturer the names and addresses of the wholesale distributors where the manufacturer's products may be purchased, nor from making an announcement in such advertising of the appointment of a new wholesale distributor.

Respectfully,
C. WILLIAM O'NEILL
Attorney General